72-1560

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1972

No. 72-1560

NATIONAL FAMILY INSURANCE COMPANY,
a Minnesota Corporation,

Petitioner,

vs.

EXCHANGE NATIONAL BANK OF CHICAGO,
a national banking association,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OPINIONS DELIVERED IN THE COURT BELOW.

The United States Court of Appeals for the Seventh Circuit filed a majority opinion and a dissenting opinion, neither of which are as yet reported. They are reproduced in the appendix.

JURISDICTION.

The date and entry of the judgment sought to be reviewed is February 20, 1973. An order denying a petition for rehearing was entered on March 15, 1973. The order was concurred by two judges of the court of appeals. A third judge of the court of appeals voted to grant the petition for rehearing. The jurisdiction of this court is invoked under Title 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW.

Question One

Whether in a case where a jury trial has been demanded a district court may under the guise of determining a motion to dismiss under Federal Rules of Civil Procedure, Rule 12(b)(6), which is converted to a motion for summary judgment under Rule 56, decide disputed questions of fact.

Question Two

Whether in a case where a jury trial has been demanded and a question of fact exists as to when the plaintiff should have discovered the defendant's fraudulent representations, the district court may decide that question of fact.

Question Three

Whether knowledge of the insolvency of a customer of a national bank gives notice of prior misrepresentations made by the national bank as to the solvency of the customer, so as to commence the running of the period of limitations for bringing a suit based upon fraudulent representations by the national bank.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

The pertinent text of the constitutional provisions and statutes involved are set forth in the appendix to this petition. Their citations are set forth below.

Constitution of the United States, Amendment 7
(appendix to this petition, page 23a)

Federal Rules of Civil Procedure, Rule 12(b)
(appendix to this petition, page 24a)

Federal Rules of Civil Procedure, Rule 56
(appendix to this petition, page 25a)

Ill. Rev. Stat. 1965, ch. 83, §16
(appendix to this petition, page 25a)

STATEMENT OF THE CASE.

This case was brought to recover damages because the defendant fraudulently misrepresented certifications to the Minnesota Department of Insurance as to the financial condition of the American Allied Insurance Company, which certifications were relied upon by and to the detriment of the plaintiff in entering into reinsurance contracts with the American Allied Insurance Company. The basis for federal jurisdiction in the district court is Title 28 U.S.C., §1332.

The defendant filed a motion to dismiss on the ground that the complaint fails to state a claim upon which relief can be granted in that the period of limitations for bringing the cause of action allegedly had expired prior to the suit being filed.

Affidavits, exhibits and memorandums were filed by both the defendant and the plaintiff with respect to the motion and a factual hearing was had in the district court on the single issue as to when the period of limitations for filing the cause of action commenced, to be determined by when the plaintiff discovered or should have discovered by the exercise of reasonable diligence that the cause of action accrued.

At the conclusion of the hearing, the district court entered an order granting the defendant's motion to dismiss, from which order the plaintiff took an appeal to the United States Court of Appeals for the Seventh Circuit. The court of appeals entered a judgment affirming the district court. A majority opinion and a dissent-

ing opinion was filed. A petition for rehearing was denied. The order was concurred by two judges of the court of appeals. A third judge of the court of appeals voted to grant the petition for rehearing.

Statement of Facts

Plaintiff, National Family Insurance Company, is a Minnesota corporation doing business in the State of Minnesota. In 1964 it entered into a 100 percent reinsurance contract with another Minnesota insurance company, American Allied Insurance Company. Under the contract American Allied agreed to reinsure all claims made against the plaintiff by plaintiff's policyholders. (App. 5-7; 158.)

The reinsurance contract expired and was renewed so that it was in effect during 1965. (App. 158.) However, the plaintiff was not satisfied with the terms of the contract and from January until April of 1965 the plaintiff and American Allied were in the process of renegotiating the terms of the agreement. (App. 159.)

In April of 1965 articles began to appear in the local newspapers stating that American Allied was in financial difficulty. W. Russell Jensch, executive director of National family, contacted the Insurance Commissioner for the State of Minnesota, Cyrus E. Magnusson, to determine if the rumors concerning American Allied's financial troubles were true. The Insurance Commissioner sent Mr. Jensch a letter advising him that American Allied "was in good shape and everything was all right." (App. 159, 166, 167.)

In June of 1965 American Allied was no longer able to pay its claims or the claims it was obligated to pay

under its reinsurance contract with National Family. (App. 160, 161.) On June 18, 1965 the Minnesota Attorney General filed an insolvency action against American Allied in Ramsey County, Minnesota. The trial lasted until July 2, 1965, and on August 4, 1965 the judge hearing the case ordered American Allied into liquidation and a receiver was appointed. (App. 133, 137, 179, 183.)

From April 12, 1965 through September 21, 1965 various articles appeared in the local newspapers concerning the insolvency and receivership of American Allied. Some of the articles provided that American Allied and certin members of the Kitzer family, owners of American Allied, had been doing business with and had accounts at the Exchange National Bank of Chicago. (App. 16-19.) One of the newspaper articles dated September 14, 1965 states that a federal grand jury investigating American Allied had subpoenaed certain officers of the Exchange National Bank of Chicago. (App. 40.) Copies of the newspaper articles were filed in the present case by the defendant as a defendant's exhibit. (App. 21-44.) The defendant also filed a synopsis of the articles (Defendant's Exhibit No. 1), which is reproduced in the addendum to this brief for convenience of court and counsel. (App. 16-19; see Addendum, *post.*)

Mr. Jensch, executive director of National Family, read the newspaper articles with "great interest" and he made inquiries about American Allied's financial troubles to the Minnesota Insurance Commissioner, Cyrus E. Magnusson, and the U. S. Attorney for the District, Miles Lord. (App. 162-164.) Mr. Jensch testified in his deposition, taken and filed in the present case, concern-

ing his inquiries to the Insurance Commissioner and the U.S. Attorney for the District (App. 169, 170):

"Q. You didn't talk about Exchange National Bank at any time with Magnusson or with Lord, am I right?

A. I would say not because the name was not familiar with me at all. There would have been nothing that I had to do with the names of the bank or anything like that. * * *.

Q. There were repeated mentions of Exchange National Bank in the newspaper articles?

A. There may have been, but it never made any impression on me. If there were, it probably was something to do with—I can't remember what I heard, if I heard, but if I heard anything about a bank, I would have probably presumed the bank lent money to the Kitzers or were their financial backers or something like that.

Q. Well, you know these newspaper articles mentioned the fact that for one thing personal loans of the Kitzers were paid off out of American Allied moneys?

A. Personal loans of the Kitzers from the bank were paid back?

Q. Yes.

A. Oh, I don't remember anything about that. There was an awful lot of stuff coming out and I was concerned mostly with the survival of National Family, not what Kitzers were doing personally."

Ray C. Lewis, attorney for National Family Insurance Company, attended every session of the first two weeks of the American Allied insolvency trial. Thereafter, he

attended the beginning of each session to see if there were motions being presented and so forth. (App. 182, 183.) Mr. Lewis testified in his deposition, taken and filed in the present case, that in about the middle of July, 1965 when he was getting off an elevator at the building where the insolvency trial was being conducted he was approached by a newspaper reporter and the following occurred (App. 184, 185):

> "A. Mr. Presbrey was his name. P-r-e-s-b-r-e-y, I think, who works for the Star. One day I came there, he buttonholed me when I came off the elevator. He said, "Mr. Lewis, what do you know about the Exchange National Bank?" I said, "What?" I said, "What do you know about them?" He said they were the bank for the Kitzers. He said there was testimony concerning the Exchange National Bank. When I saw Mr. Magnusson [Insurance Commissioner for the State of Minnesota], I asked him about the Exchange National Bank and he said that was the bank for the Kitzers and for the Bell Casualty, which is an insurance company in Chicago which Kitzers also owned. And he said, "For some reason or other the Kitzers have been sort of using this bank as a bank for American Allied, too, although I don't understand that," he said. So I asked him what was said, "Well," he said, all that came out that he knew about was that the bank had made some loans to the Kitzers and the loans had been paid back, and there was something—according to the attorney general's office—there was something fishy about that. He didn't understand what it was. I said, "Well, Mr. Magnusson, let's go into this. What were the loans?" He said it had something to do with surplus

notes. Well, the Minnesota law is—and I can't quote it for you—that surplus notes can only be paid back if there is surplus out of which to pay them. There is a general law. I called attention to Mr. Magnusson about that. I said, "Were the Kitzers—were their surplus notes paid back?" He said, "Apparently they were." I said, "Well, you should know as the insurance commissioner." He said, "Well, actually, yes they were." And then I said, "Well, if the company was supposed to be insolvent—" he said, "They weren't insolvent." He said that they weren't insolvent. I said, "If they were insolvent, how were the Kitzers supposed to be paid back?" He said they weren't insolvent. I covered this point several times with Mr. Magnusson about the surplus notes. This came about because the Exchange was mentioned. We went on into surplus notes. There was nothing that Mr. Magnusson told me which was in any way derogatory to the bank. Only that they were the Kitzers bankers."

Mr. Lewis also testified in the deposition (App. 186, 187):

"The only other time that we mentioned Exchange Bank with Mr. Magnusson—and I can't remember when this was—but I do remember discussing this with Mr. Magnusson was the fact that—

Q. When was this, first of all?

A. I don't know. It was during that summer.

Q. June, July?

A. June, July and August. During the course of this insolvency trial, I asked—well, Mr. Magnusson volunteered the information that sometime during

the examination of the American Allied, which had occurred prior to this hearing—and whether or not it was in 1964 when they were examined or in 1965 when they were examined, I don't know—he didn't tell me. I found out from reading other evidence that it was '65.

Q. During the insolvency trial?

A. During the insolvency trial and prior to the criminal trial in Bismarck. I had no idea when this was.

Q. Sure.

A. He said that somebody from the bank had accompanied the Kitzers with some treasury notes —a large amount, I think he said—of treasury notes and they flew them in and that he said that these treasury notes belonged to American Allied.

Q. Flew them into Minnesota?

A. Flew them into Minnesota and showed them to Magnusson, as I understand it—now I could be wrong on this—and showed them to the examiners which would have been either Mr. Ramburg or Mr. Haugen.

Q. They were examiners in the Minnesota Insurance Department, I take it?

A. The Minnesota Insurance Department, and I said, "Did these securities belong to Kitzers?" And he said, "Well, no, they shouldn't belong to Kitzers. They belong to American Allied." Which, of course, is different. I said, "I will rephrase it." He said, "Yes. They did belong to the Kitzers and to American Allied, but," he said, "you know, my examiners feel that these securities really belong to the Bell Casualty and that they were using—the Kitzers were

using—the same securities two ways." And he says, "One of them even thinks they might be using them three ways." Now we are talking about the Kitzers.

Q. That they were using them to show as assets of Bell Casualty and Bell Mutual?

A. And American Allied.

Q. And American Allied, I suppose, is that what you mean? That's why they brought them up here?

A. Bell Casualty and Bell Mutual.

Q. Two separate companies?

A. Using for one of them or both of them, for all I know, and American Allied and also a bank in Minnesota which the Kitzers bought, which I can't remember the name of it now. It's in St. Paul. But he said he didn't know about this. That one of his examiners thought that this was true. But at no time was anything said about Exchange National Bank except that they were the custodian of the funds and I asked him why they came along. He said, "Well, with half a million dollars, I suppose they—"

Q. You mean why some representative of the bank came along?

A. Yes. With a half a million dollars around you want more than one person with them. That's the only explanation he gave.

Q. That the bank was custodian of the bonds they brought up here?

A. Yes."

Concerning his reading of the newspaper articles that appeared during the insolvency trial, Mr. Lewis testified in the deposition (App. 191-193):

"A. I think, however, if I would have read that that I would have done like I did the others. Now other people that I contacted, Mr. Cudd, who is the chief attorney for the—Earl Cudd, who was the trial man for the attorney general's office in the insolvency matter, we sat in the same room several times. Well, many times, and I tried my best to pick his brains, so to speak, but he wasn't talking and I think properly so. And I talked to Mr. Mattson who was the attorney general on three different occasions.

Q. Mattson not Magnusson?

A. M-a-t-t-s-o-n. He was the attorney general at the time. Minnesota attorney general. And his response was, "Ray, even if I knew something, I couldn't tell you. And I know very little." I talked to Mr. Wendel who was the defense attorney for American Allied, and he gave me the same story. "Ray, I got a client that I must protect. I can't talk to you." I talked to Mr. David Kroman, who wanted me to represent U.S. Mutual with him, which I refused to do, of course, but aside from trying to get information from me, Mr. Kroman was very closed mouth. He talked a lot, but he said nothing. I talked to Mr. Anderson, who was the chief examiner of the Insurance Department after he testified in the trial and I tried my best to find out what he knew about the total operation, and he didn't know very much. And he kept saying that, "You will have to talk to Mr. Magnusson, the insurance commissioner." I met with Mr. Magnusson—I talked to Mr. Ramberg, the other examiner, once or twice. I can't recall specifically anything specific about what happened because he was assigned to Mr. Lord's office as a helper and

he was under instructions not to disclose information. So he was not very helpful. As a matter of fact, I racked my brain to find out somebody that I could talk to to get some information which—not about the bank because there wasn't enough about the bank for me to really realize that there was anything there to investigate—but anything under the sun that I could find out about this. And I ran up against dead end after dead end.

Q. Did you talk to Mr. Haugen? Silas Haugen?

A. Yes.

Q. He was an insurance examiner in the Minnesota Insurance Department?

A. Yes. Mr. Ramberg and Mr. Haugen were two of the examiners. There may have been others. Two of the examiners that were examining American Allied.

Q. I take it you didn't ask him anything about the bank?

A. No. So far as I know the question about the bank never came up in talking to Mr. Haugen.

Q. Did you talk to anybody at the bank?

A. Exchange Bank?

Q. Yes.

A. No. If I ever met anybody from the bank, it would have been at the trial and I wouldn't have known he was from the bank. I wouldn't know any of the officers if they walked in the room. I wouldn't know who they were."

Herbert K. Ramberg who was senior examiner for the Insurance Division of the State of Minnesota from 1963 through 1965 testified in the present case. In 1964

he participated in an examination of the American Allied Insurance Company which was conducted by the Minnesota Department of Insurance. He examined the history, management and corporate records of the company and he prepared an examination report. In conducting the examination and making the report the only thing he learned as to the Exchange National Bank being involved with American Allied is that American Allied had an account at the bank. (App. 143, 144.)

Mr. Ramberg was assigned to a second examination of American Allied in April of 1965. In connection with his examination of the company he worked with the Minnesota Attorney General's office and the U. S. District Attorney's office. During the entire course of Ramberg's examination of American Allied, which included the period during the insolvency trial and proceedings, he did not find any irregularities in the Exchange National Bank's relationship with American Allied. (App. 144-146.)

From June of 1965 until the end of October, 1965 the records and reports of American Allied were sequestered by the U. S. Attorney's office and they were not available for examination or inspection. (App. 147, 179.)

On October 30, 1965 the U. S. government indicted seventeen people, including Philip Kitzer, Sr., Philip Kitzer, Jr. and three officers of the Exchange National Bank of Chicago on charges, inter alia, that they fraudulently misrepresented certifications made to the Minnesota Department of Insurance with respect to the financial condition of American Allied and that they thereby caused other insurance companies to enter into reinsur-

ance contracts with American Allied and suffer great losses. The criminal trial was commenced in Bismarck, Minnesota on March 20, 1967. (App. 65, 178, 179.)

On September 23, 1970 National Family filed the complaint in the present case alleging that the Exchange National Bank of Chicago fraudulently misrepresented certifications to the Minnesota Department of Insurance as to the financial condition of American Allied, and that National Family relied upon such certifications through the Minnesota Department of Insurance in entering into reinsurance contracts with American Allied, thereby suffering great losses. Paragraphs 11 and 12 of the complaint allege that the Exchange National Bank of Chicago engaged in and participated in such fraudulent misrepresentations on or about August 9, 1961 and thereafter. (App. 5-11.) A jury demand was filed by the plaintiff. (App. 1.)

The defendant filed a motion to dismiss on the ground that the complaint fails to state a claim upon which relief can be granted in that the cause of action did not accrue within five years next before the commencement of the action. (App. 12.) Affidavits, exhibits, and memorandums were filed by both the defendant and the plaintiff with respect to the motion. (Rec. 25, 39-86, 88-112, 116-140, 141-159, 160-180, 192-198, 202-206, 207-210, 227-229, 235-265.)

The court stated that since affidavits and exhibits were filed by both sides, it would treat the defendant's motion as a motion for summary judgment. (App. 101.) The court decided that the conflict which arose from the affidavits and exhibits and pleadings created an issue that was not ripe for summary judgment, and which would ordi-

narily be cause for denial of the motion. (App. 104.) However, the court then conducted a factual hearing on the single issue as to when the period of limitations began to run, to be determined by when the plaintiff knew or should have known by the exercise of ordinary diligence when the cause of action accrued (App. 148):

> "The Court: • • • We are ready to go forward. The issue which we are trying to determine, and I must apologize for the piecemeal fashion in which we are doing it, is when the statute of limitations began to run on plaintiff's cause of action as determined by whether—when appropriate persons, either knew or should have known of a certain state of facts."
>
> • • • • •
>
> "Mr. Pause: • • • By the exercise of ordinary diligence, or the discovery thereof.
>
> The Court: When they knew or should have known, and I will accept that amendment, by the exercise of ordinary diligence, all right.
>
> We have here the testimony of one witness—I don't —my understanding was that other than that, you were going to rely on the evidentiary matter already on file.
>
> Mr. Pause: That is what I understand, what Mr. Bernhard had mentioned."

At the conclusion of the hearing the court ruled (App. 155, 156):

> "The Court: • • • We have had occasion to consider the matter earlier in the context of a ruling on a motion for summary judgment.

I take the argument today to be in support of an alternative motion to dismiss, which is based solely on the statute of limitations, and it is on that sole issue that I am prepared to rule.

It is the finding of the Court, after the consideration of the evidence that is available to me in the form of pleadings, depositions, and other matters called to my attention, that the misrepresentations of the Exchange National Bank which are basically what is sued upon, whether directly or indirectly, relate to the financial condition of American Allied. * * *

The operative facts which put National Family on notice of their cause of action here are the evidences of insolvency of American Allied and nothing else. National's faith in the misrepresentations causing it to believe that American Allied was solvent, ripened into a cause of action when National learned, or should have learned that American Allied was insolvent. It seems clear from the evidence the beginning of that knowledge certainly should have occurred somewhere around June 10th, 1965, when National found American Allied no longer able, because of insolvency and the Court ruling, to live up to its obligations under the reinsurance contract.

The cause of action which is asserted here, therefore, ripened into a cause of action some time in June or in any event, no later than mid-September of 1965. The complaint here was filed more than five years after that date. Therefore, the motion to dismiss filed by the defendant, based on the statute of limitations, is granted."

The appeal to the United States Court of Appeals ensued.

REASONS FOR THE ALLOWANCE OF THE WRIT.

I.

Where a jury trial is demanded a district court may not decide disputed questions of fact under the guise of determining a motion to dismiss under Federal Rules of Civil Procedure, Rule 12 (b)(6) which is converted to a motion for summary judgment under Rule 56.

Since the motion to dismiss in this case was converted to a motion for summary judgment the standards applicable under Federal Rules of Civil Procedure, Rule 56 govern its disposition. (See Appendix, *post.*) In deciding the motion, pursuant to Rule 56, a district court may only determine whether an issue of fact exists. It may not actually decide any issue of fact for by doing so deprives a party of its right to a trial by jury. (See, *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962); *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 64 S. Ct. 724, 88 L. Ed. 967 (1944).)

II.

When a jury trial has been demanded and a question of fact exists as to when a plaintiff should have discovered the defendant's fraudulent representations, the district court judge may not decide that question of fact.

This action is based upon the common law tort of fraud, as to which the applicable Illinois period of limitation for bringing the action is five years. (Ill. Rev. Stat., ch. 83 §16, 1965.) However, under the decisions of this court, as well as the reviewing courts of Illinois,

the period of limitations for an action based on fraud does not commence until the plaintiff either has discovered the fraud, or by the exercise of reasonable diligence, should have discovered it. (*Holmberg* v. *Armbrecht,* 327 U.S. 392, 397, 66 S. Ct. 582, 585, 90 L. Ed. 743, 748 (1946); *Exploration Co.* v. *United States,* 247 U.S. 435, 477, 38 S. Ct. 571, 573, 63 L. Ed. 1200, 1206 (1918), citing *Bailey* v. *Glover,* 21 Wall, 342, 22 L. Ed. 636; *Ohlendorf* v. *Bennett,* 241 Ill. App. 537, 565 (1926).)

In *Holmberg* v. *Armbrecht,* 327 U.S. 392, 397, 66 S. Ct. 582, 585, 90 L. Ed. 743, 748 (1946):

> "And so this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.' *Bailey* v. *Glover,* 21 Wall. 342, 348, 22 L. Ed. 636; and see *Exploration Co.* v. *United States,* 247 U.S. 435, 38 S. Ct. 571, 62 L. Ed. 1200; *Sherwood* v. *Sutton,* Fed. Cas. No. 12, 782, 5 Mason 143."

In *Exploration Co.* v. *United States,* 247 U.S. 435, 447, 38 S. Ct. 571, 573, 63 L. Ed. 1200, 1206 (1918), citing *Bailey* v. *Glover,* 21 Wall. 342, 22 L. Ed. 636:

> "It will be observed in that [limitation] statute, as in the one now under consideration, there was no provision that the cause of action should not be deemed to have accrued until the discovery of the fraud. But it was held that for the purpose of such statutes the cause of action did not accrue until the discovery of the fraud; that such was the undisputed doctrine of courts of equity, and that the weight of

authority, English and American, applied the same rule to actions at law."

In *Ohlendorf* v. *Bennett,* 241 Ill. App. 537, 565, (1926):

"Where a cause arises from a fraud, the statute of limitations will not begin to run nor laches apply until the discovery of the fraud or from the time the fraud could have been discovered by the exercise of reasonable diligence. (*Farwell* v. *Great Western Tel. Co.,* 161 Ill. 592, p. 596, and cases cited.)"

As pointed out in the dissenting opinion of the court of appeals, neither the district court nor the majority opinion of the court of appeals found that the plaintiff had actual knowledge of the defendant's fraudulent representations at any time prior to September 23, 1965, five years prior to the date of filing this suit. (See appendix *post.*) The tolling of the period of limitations in this case could, then, only be based on a finding of constructive notice.

As to constructive notice, however, the district court and the majority opinion of the court of appeals are in conflict as to what constituted such alleged notice.

The district court based its dismissal of the complaint solely on the fact that American Allied Insurance Company had become insolvent in June of 1965, its insolvency culminating in a court order entered on August 4, 1965 that the company be liquidated.

The majority opinion of the court of appeals applied a different criterion, relying on the fact that newspaper articles which might be interpreted as raising suspicions about American Allied's financial condition had appeared as early as April 12, 1965. (See appendix *post.*)

Whichever basis is considered, however, it is clear that the dismissal of the plaintiff's complaint was based not on actual notice of the defendant's fraudulent representations, but on alleged constructive notice, which under the circumstances necessitated a factual determination by the district court judge. This judicial determination was improper under Rule 56 and constituted a deprivation of the plaintiff's right to a jury trial.

III.

Knowledge of the insolvency of a customer of a national bank does not give notice to an innocent third party of misrepresentations made by the national bank as to the solvency of the customer, so as to commence the running of the period of limitations for bringing an action against the national bank based upon the alleged fraudulent representations.

The parties to this action are engaged in the insurance and banking fields, businesses whose activities are, and must be, subject to close scrutiny for the protection of the public. Nonetheless, the ruling and decision of the lower courts in this case erect an unwarranted and false shield to protect a bank which violates its obligations to the public.

In dismissing the complaint the district court ruled that knowledge of the insolvency of American Allied set in operation the period of limitations for bringing a suit based on fraud against the defendant Exchange National Bank of Chicago. The district court stated (App. 155, 156):

> "The operative facts which put National Family on notice of their cause of action here are the evidences of insolvency of American Allied and nothing else.

> National's faith in the misrepresentations causing it to believe that American Allied was solvent, ripened into a cause of action when National learned, or should have learned that American Allied was insolvent."

The defect in this reasoning is made readily apparent by the dissenting judge in the court of appeals, who states (see dissenting opinion, appendix, *post.*):

> "The district court finds a sufficient basis for constructive notice in the fact, which was obvious to all interested parties, that American Allied was insolvent. It appears to me, however, that there is an insurmountable gap between knowledge of the insolvency of A and being put on notice that B had misrepresented that solvency."

None of the evidence presented to the district court in this case concerned misrepresentations made directly to the plaintiff, rather, the complaint alleges, and the evidence before the district court deals solely with alleged misrepresentations to third parties, i.e., the insurance commissioners of Illinois and Minnesota.

As noted in the dissenting opinion filed in the court of appeals, mere suspicion is not enough to commence the operation of a statute of limitations. (*Grant* v. *National Bank,* 97 U.S. 80 (1877).) The test of whether notice of fraudulent representations is imputed to a party is not based on what an extremely cautious person might do, but what a reasonably prudent person should do. (*Southwestern Petroleum Corp.* v. *Udall,* 361 F. 2d 650, 657 (10th Cir., (1966).) Where conflicting inferences may be drawn, as in the present case, the question of what a prudent person should do necessarily involves a factual determination, which determination cannot be

made judicially where a jury trial is demanded. The making of such a factual determination by the district court judge transgressed the plaintiff's right to a jury trial.

CONCLUSION.

The dismissal of the plaintiff's complaint, under the circumstances, necessitated a factual determination by the district court judge. This judicial determination was improper under Federal Rules of Civil Procedure, Rule 56 and constituted a deprivation of the plaintiff's right to a jury trial.

It is respectfully submitted that this court issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit so that this important and substantial case resulting from the conduct of a national bank be reviewed and decided by this court.

Respectfully submitted,

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APPENDIX A

In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1972 — SEPTEMBER SESSION, 1972

No. 71-1617

NATIONAL FAMILY INSURANCE COMPANY, a Minnesota Corporation,

Plaintiff-Appellant,

v.

EXCHANGE NATIONAL BANK OF CHICAGO, a National Banking Association,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 70-C-2346

FRANK J. McGARR, *Judge*

ARGUED OCTOBER 27, 1972 — DECIDED FEBRUARY 20, 1973

Before HASTINGS, *Senior Circuit Judge,* FAIRCHILD and PELL, *Circuit Judges.*

HASTINGS, *Senior Circuit Judge.* National Family Insurance Company, a Minnesota corporation (National Family), filed this action in the district court against Exchange National Bank of Chicago, a national banking association (Exchange Bank). Plaintiff is an insurance company and at all times herein concerned was 100 per cent reinsured by American Allied Insurance Company (Amer-

ican Allied) at a cost to plaintiff of more than $1,000,000 in premiums. American Allied was one of a group of insurance companies in Minnesota and Illinois owned and controlled by the Phillip Kitzer family. American Allied was adjudged to be insolvent by a Minnesota state court, and a receiver was appointed.

In brief, National Family seeks to recover substantial damages because of heavy losses it sustained by reason of Exchange Bank's alleged fraudulent misrepresentations of the true financial status of plaintiff's 100 per cent reinsurer, American Allied.

The instant appeal is by National Family from an order of the district court dismissing this action against Exchange Bank on the ground that it was barred by the running of the five-year Illinois statute of limitations, Illinois Revised Statutes, chapter 83, §16 (1969), which provides that an action such as plaintiff's herein "shall be commenced within 5 years next after the cause of action accrued." Plaintiff seeks to avoid this limitation by relying on the "fraudulent concealment" exception set out in Illinois Revised Statutes, chapter 83, §23 (1969), which provides: "If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action, and not afterwards." This action having arisen in Illinois and being based upon diversity of citizenship, the Illinois law governing limitations applies. *Bernard Food Industries, Inc.* v. *Dietene Co.*, 7 Cir., 415 F.2d 1279, 1282 (1969), cert. denied, 397 U.S. 912 (1970).

Plaintiff filed its complaint on September 25, 1970, and its notice of demand for jury trial on September 30, 1970. On October 15, 1970, defendant raised the limitations issue

by filing its motion to dismiss the complaint on the ground that it failed to state a claim against defendant upon which relief could be granted because of the five-year limitations bar raised by chapter 83, §16, *supra*. Thereafter, each party filed numerous exhibits, affidavits, counter-affidavits, depositions and memoranda in support of and in opposition to the motion to dismiss. Subsequently, pursuant to Rule 12(b), Federal Rules of Civil Procedure, Title 28, U.S.C.A., defendant's motion to dismiss was treated as one for summary judgment.

On May 3, 1971, the district court filed its written opinion and order and concluded:

> "The conflict that arises from the facts outlined above creates an issue that is not ripe for resolution on motion for summary judgment and would ordinarily be cause for denial. However, in view of the obviously complicated and lengthy litigation that will ensue on the trial of this cause, the court has decided to order a factual hearing solely to determine whether, in accordance with the standard set out earlier in this opinion, the statute of limitations began to run prior to September 23, 1965."

We have carefully reviewed the trial court's memorandum opinion of May 3, 1971. In our judgment it correctly summarizes the nature of the cause of action and the relation of parties thereto, as well as the position of American Allied and the "Kitzer Family" and its activities. The court properly treated the motion to dismiss as one for summary judgment. *Sticker Industrial Supply Corp.* v. *Blaw-Knox Co.*, 7 Cir., 367 F.2d 744, 745 n. 1 (1966).

We have examined the Illinois law cited by the trial court in its written opinion. The court correctly determined that, although the "fraudulent concealment" exception set out in chapter 83, §23, *supra*, literally reads that

the right of action for concealment of fraud remains for a period of five years from the date plaintiff actually discovers the fraud, yet the Illinois courts have applied the ordinary fraud standards to determine when the cause of action accrues. The applicable statutory period here commences at the time the plaintiff, *through ordinary diligence,* should have discovered the fraudulent actions causing its injury. "Mere silence of the defendant and mere failure on the part of the complainant to learn of a cause of action do not amount to such fraudulent concealment." *Jackson* v. *Anderson,* 355 Ill. 550, 557 (1934).

The trial court further found that the statutory period of five years was uninterrupted. It noted the complaint charged that the Kitzers and American Allied were customers of defendant Exchange Bank for almost four years from August 1, 1961, through June 5, 1965, and from that logically assumed that all acts of fraudulent representations must have occurred within that period. Insolvency proceedings against American Allied commenced June 10, 1965. Beginning as early as April 12, 1965, and continuing on through September 21, 1965, a total of 27 newspaper articles appeared in the St. Paul-Minneapolis area (where plaintiff is located) questioning various financial dealings of American Allied and reporting a suit against defendant Exchange Bank by the receiver of American Allied. These were attached as exhibits to defendant's motion for dismissal and/or summary judgment. The court specifically found that "[t]his publicity and the insolvent condition of American Allied would alone appear to be sufficient notice."

However, because of plaintiff's counter-showing by affidavit that it was unaware of any fraud on the part of defendant Exchange Bank until 1967, the trial court

wisely decided that this conflict was not ripe for summary judgment disposition.

Following the foregoing order of May 3, 1971, certain depositions were taken by plaintiff and additional documentary evidence was filed. The next hearing on the limitations issue was held before the court the afternoon of June 9, 1971. Plaintiff presented the testimony of one witness. Both parties relied on depositions previously taken. The matter was not concluded but was next resumed on the afternoon of June 23, 1971.

The hearing was resumed on the limitations issue previously considered and under the guidelines set out in the earlier order. Certain documents in the Minnesota state court insolvency matter were admitted in evidence, and all counsel were heard at length on the issue before the court. At the conclusion of the hearing the trial court orally announced the following findings and ruling from the bench:

> "The hour is late, you have argued, all of you, adequately and capably. I have read the pleadings. We have had occasion to consider the matter earlier in the context of a ruling on a motion for summary judgment.
>
> "I take the argument today to be in support of an alternative motion to dismiss, which is based solely on the statute of limitations, and it is on that sole issue that I am prepared to rule.
>
> "It is the finding of the Court, after the consideration of the evidence that is available to me in the form of pleadings, depositions, and other matters called to my attention, that the misrepresentations of the Exchange National Bank which are basically what is sued upon, whether directly or indirectly, relate to the financial condition of American Allied. The extent to which Exchange National Bank may be involved in any financial machinations, as they have been called here, to bring about the insolvency, or even to conceal

the insolvency of American Allied, are not relevant, except as they operate to deceive National Family as to the financial condition of American Allied.

"The operative facts which put National Family on notice of their cause of action here are the evidences of insolvency of American Allied and nothing else. National's faith in the misrepresentations causing it to believe that American Allied was solvent, ripened into a cause of action when National learned, or should have learned that American Allied was insolvent. It seems clear from the evidence the beginning of that knowledge certainly should have occurred somewhere around June 10th, 1965, when National found American Allied no longer able, because of insolvency and the Court ruling, to live up to its obligations under the reinsurance contract.

"The cause of action which is asserted here, therefore, ripened into a cause of action some time in June or in any event, no later than mid-September of 1965. The complaint here was filed more than five years after that date. Therefore, the motion to dismiss filed by the defendant, based on the statute of limitations, is granted."

We have examined the record before the district court and understand the district court's interpretation thereof to mean that plaintiff's available information should have been sufficient to have put plaintiff upon notice of its cause of action at a time between June 10 and mid-September 1965. The chronology of events and publicity involving defendant Exchange Bank which, through the exercise of ordinary diligence, should have caused plaintiff National Family to have discovered the fraudulent actions causing its injury, follows:

The newspaper articles appearing on April 12, 1965, related accusations by two state legislators that the Minnesota Insurance Commissioner (later indicted with the

Kitzers and three bank officers) had misused his office and that $1,000,000 of American Allied funds had been transferred to an unauthorized Chicago bank account.

In June 1965, American Allied was no longer able to pay claims on its reinsurance obligations and National Family began to pay them itself. Insolvency proceedings against American Allied were commenced in the Minnesota state courts on June 10, 1965. On August 4, 1965, American Allied was found to be insolvent, and a receiver was appointed. In June, July and August 1965, the newspaper articles earlier mentioned informed the public in that area concerning the alleged illegal activities of defendant Exchange Bank, certain of its officers, the Kitzers, the Minnesota Insurance Commissioner, together with other attendant litigation, and the resulting insolvency of American Allied. Further publicity concerning the same subject matter appeared on September 14, 17 and 18, 1965. Deposition testimony of Jensch, plaintiff's executive director, and of Lewis, its counsel, was also revealing of National Family's pre-September 23, 1965, awareness or cause for awareness of defendant Exchange Bank's alleged fraudulent activities.

Without further detailing the evidence, we are satisfied that the district court was amply justified in finding and holding that plaintiff knew or should have known of its cause of action against defendant more than five years prior to filing its complaint on September 23, 1970.

Finally, plaintiff makes the belated contention that this case presented an issue of fact which should have been determined by a jury since it had originally filed a notice of demand for a jury trial. This charge is without merit and is raised for the first time in the instant appeal. The district court did not act summarily and refused to determine the limitations issue by summary judgment.

It handed down a memorandum opinion to that effect on May 3, 1971. At that time it ordered a factual hearing solely to determine the limitations issue. This second hearing was held on June 9, 1971, and was resumed to completion on June 23, 1971. Plaintiff not only made no objection to this procedure but approved and fully participated in it by presenting witnesses, documentary evidence and arguments on its own behalf.

Quite aside from any question of plaintiff's right to a jury trial on the limitations issue on a motion to dismiss, it is now too late for plaintiff to raise this question for the first time on appeal. *Brown* v. *Wisconsin State Department of Public Welfare*, 7 Cir., 457 F.2d 257, 259 (1972); *Desert Palace, Inc.* v. *Salisbury*, 7 Cir., 401 F.2d 320, 324 (1968). *Cf. Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, 4 Cir., 438 F.2d 248, 250 (1971).

Further, this procedural question is a matter governed by federal law, and there is ample authority that if any such right existed, plaintiff waived it by proceeding to the trial of that issue before the court without objection. *Kearney* v. *Case*, 79 U.S. (12 Wall.) 275, 284 (1871); *Smith* v. *Cushman Motor Works, Inc.*, 8 Cir., 178 F.2d 953, 954 (1950). *See also Bradley* v. *Maryland Casualty Co.*, 8 Cir., 382 F.2d 415, 420 (1967) (written by then-Circuit Judge Blackmun). *Cf. Maytag Co.* v. *Meadows Manufacturing Co.*, 7 Cir., 45 F.2d 299, 301-302 (1930), cert. denied, 283 U.S. 843 (1931).

Finding as we do that the limitations issue was correctly determined on its merits and that the procedural issue is without substance, the judgment of dismissal is affirmed.

Affirmed.

DISSENTING OPINION

PELL, *Circuit Judge,* dissenting.

The well expressed opinion of Judge Hastings in my view correctly and succinctly sets forth the factual picture and legal issues in this appeal and reaches the proper result on the claim of right to a jury trial. Respectfully, however, I am unable to agree with the determination reached as to the principal issue and therefore dissent from that portion of the opinion.

That issue, as to which there seems to be no disagreement as to what it is, is whether prior to September 23, 1965, the plaintiff insurance company discovered or with reasonable diligence should have discovered the alleged fraudulent misrepresentations made by the defendant bank to the Minnesota Department of Insurance as to the financial condition of American Allied.

The district court did not find actual knowledge as I read its opinion, and the question remains whether there was constructive notice.[1] The district court finds a sufficient basis for constructive notice in the fact, which was obvious to all interested parties, that American Allied was insolvent. It appears to me, however, that there is an insurmountable gap between knowledge of the in-

[1] For convenience of reference, I have categorized by the term "constructive notice" factual situations in which there is a lack of actual notice but there is that which in the law is equated with actual notice. This is variously termed "implied notice," "constructive notice," "presumptive or imputed notice." See 66 C.J.S. *Notice* §§5, 6 & 10 at 638, 639 & 642 (1950).

The Ninth Circuit expressed the thought that constructive notice includes "implied notice" and "inquiry notice," the latter apparently being similar to or identical with "implied notice." *F.P. Baugh, Inc.* v. *Little Lake Lumber Company,* 297 F.2d 692, 696 (9th Cir. 1961), *cert. denied,* 370 U.S. 909 (1962).

solvency of A and being put on notice that B had misrepresented that solvency.

The majority opinion basically relies on the fact that the defendant bank was sometimes mentioned in the abundant newspaper publicity concerning the defalcations of American Allied's agents and representatives. This was not, however, the basis on which the district court, which had all of the evidence before it, determined the issue. The district court simply stated, "The operative facts which put National Family on notice of their cause of action here are the evidences of insolvency of American Allied *and nothing else*." (Emphasis added.)

It is not uncommon for con artists, corporate or individual, to utilize innocent banking institutions in connection with their machinations. Funds are deposited, shifted, withdrawn, put into blind accounts and otherwise maneuvered, often with great expedition. Loans including mortgages are often made to those with impure hearts because of a lack of knowledge thereof by the lending bank. In short, because a customer of a bank has had his acts of fraud and insolvency exposed does not implicate the lending or depository bank with knowledge thereof. I cannot therefore agree with the district court's apparent holding that just because the plaintiff knew American Allied was insolvent it should have been aware that the defendant bank might have been implicated.

Conceding, however, that if the record shows other facts, even though not relied upon by the district court, justifying constructive notice we must affirm, I turn to that upon which the majority opinion relies, *i.e.*, the newspaper publicity in which the name of the defendant bank was mentioned and certain depositions.

In my opinion, and respectfully to the analysis of Judge Hastings, these did not serve as a flag of implica-

tion. I would venture the opinion that the district judge may have so thought when he did not base his decision on the fact that publicity had mentioned the defendant bank.

While there were numerous newspaper articles which clearly established that American Allied was on a collision course with financial disaster, the defendant bank was not named in many of these articles.

The transfer of funds to "an unauthorized Chicago bank account" can mean no more in my opinion than that a deposit was made without necessary American Allied corporate authority. This might indicate that the bank was not sufficiently insistent upon corporate resolutions but would scarcely implicate the bank in any fraudulent machinations.

I cannot find that the newspaper articles in June, July or August 1965 informed the public in the St. Paul-Minneapolis area of any illegal activities of the defendant bank or its officials. These articles at most indicated that the bank was a depository of funds of American Allied and had made loans to it. An article on July 12 states that Kitzer, Senior, took funds from one of the companies and pledged the securities to the Exchange National Bank of Chicago to cover personal loans. This indicates a defalcation on the part of Kitzer but does not reflect that any bank had any knowledge that he was using other than his own personal assets.

An article of July 20, 1965, stated that Kitzer, Senior, "pledged securities belonging to the insurance firms as collateral for personal loans at a bank. The bank sold the bonds when Kitzer defaulted on his notes, but policy holders of the Bell firms have brought suit against the bank claiming it had no right to sell the bonds."

Here the bank involved is not identified and at most, even assuming that plaintiff's representatives should have been aware that the bank was the defendant bank, there is no showing that the bank was not properly taking steps to collect a loan which it had made on a bona fide basis.

An article of July 24, without identifying any bank specifically, stated that funds were being shifted between the Twin Cities and the Chicago, Illinois banks. There is no showing that whatever bank it may have been was aware of the shifting.

In an article of August 8, there is a vague reference to "the unexplained shift of $1.1 million in company money from St. Paul to Chicago, where the Kitzers headquartered." The same article, again without identifying the bank, stated: "He alleged that $200,000 in securities listed as company assets had been transferred to a Chicago bank and placed in Kitzer's personal account or the account of someone named by him."

On August 13, an article reflected that a grand jury had subpoenaed records from two named banks in Minneapolis and had also subpoenaed "two officials of a Chicago, Illinois, bank and a New York, N.Y., investment firm."

On August 21, 1965, a suit was brought to foreclose a mortgage on the American Allied Building and the defendant bank is mentioned as the original mortgagee. Again, there is no showing other than a bona fide transaction. The article indicated that there would be a claim as to the legality of the mortgage but it is not an uncommon occurrence for dissident creditors to attempt to set aside liens which would otherwise make their claims less collectible.

In an article of September 10, 1965, an Illinois Insurance Department examiner was quoted as stating that

certain money could not be properly considered as an asset of the American Allied firm "since it was prepledged to the bank which granted Kitzer's loan." Thus, as late as September there was some authoritative indication that the bank which had granted Kitzer's loan was doing so within the limits of proper banking practice.

It was not until an article of September 17, 1965 (five years and six days before the filing of the complaint here involved) that there was any specificity with regard to possible involvement of the defendant bank. An article of September 17 related that several suits had been filed against American Allied and its officers. One of these named the defendant bank as a party. With regard to the suit, the article stated the following: "It is alleged that the bank paid over the money to the Kitzers knowing that they were borrowing it for 'their own personal use.' It also is claimed that the Chicago bank assigned the mortgage to Mrs. Brown while proceedings were pending before Pearson to have the company declared insolvent."

An article the next day also referred to the same suit and mentioned the further claim that the bank had assigned the mortgage to a Mrs. Brown while insolvency proceedings were pending.

The bank was charged, in still another article of September 18, with knowing that the Kitzers were borrowing for their own personal use. Finally, on September 21, an article stated that a vice-president of the defendant bank was expected to appear that day before the federal grand jury investigating the collapse of American Allied. This, of course, on the surface presents nothing more than the usual situation of calling in, where fraudulent financial schemes are involved, those who were acquainted with the financial affairs of the defrauding party. It has often been utilized as an initial source of inquiry.

While regretting the necessity of lengthening this dissent by the foregoing analysis, I have found it to be necessary to show that there was not, in my opinion, sufficient to establish a duty of diligent inquiry but at most there were suspicious but highly ambiguous circumstances of merely possible involvement of the defendant bank. Even the status of being suspicious did not really occur until about September 14. An analogous situation was reported in *Grant* v. *National Bank*, 97 U.S. 80 (1877), where the Court held that to invalidate a fraudulent preference the creditor must have had such knowledge of facts as to induce a reasonable belief of the debtor's insolvency and it was not sufficient that he had some cause to suspect such insolvency.

The case is of double significance here because it also involved a bank dealing with one who was found out to be insolvent. The Court summarized the situation at page 82:

> "The circumstances calculated to excite their suspicions are very ably and ingeniously summed up in the brief of the appellant's counsel; but we see nothing adduced therein which is sufficient to establish any thing more than cause for suspicion. That Miller borrowed money; that he had to renew his note; that he overdrew his account; that he was addicted to some incorrect habits; that he was somewhat reckless in his manner of doing business; that he seemed to be pressed for money,—were all facts well enough calculated to make the officers of the bank cautious and distrustful; but it is not shown that any facts had come to their knowledge which were sufficient to lay any other ground than that of mere suspicion."

With regard to the matter of the general test here applicable for imputing notice, the Tenth Circuit in *Southwestern Petroleum Corporation* v. *Udall,* 361 F.2d 650, 657 (10th Cir. 1966), stated:

> "We agree that the test for imputing notice of a superior right is generally whether facts are sufficient to put an ordinarily prudent man on inquiry, an inquiry which, if followed with reasonable diligence, would lead to the discovery of defects in the title or of equitable rights of others affecting the property. *The test is not what an extremely cautious person might do, but what a prudent one should do. Charles* v. *Roxana Petroleum Corp.,* 282 F.983 (8th Cir.), cert. den. 261 U.S. 614, 43 S.Ct. 361, 67 L.Ed. 827.
>
> "The existence of other later offers is not such a fact as to put Lowe on notice that a conflicting claim exists. This is a common situation which in itself should cause no suspicion." (Emphasis added.)

Further, it is to be noted that a respectable body of authority recognizes as "a broad, general proposition . . . that no one is chargeable with constructive notice of a statement, advertisement, or other matter printed in a newspaper, in the absence of a statute expressly authorizing such publication and declaring the effect of a compliance with its terms, or unless it is seen by the person to be charged." 58 AM.JUR.2d *Notice* §17 (1971). Here there was no contention that any statute was applicable and there was a substantial doubt in the record as to the awareness of plaintiff's representatives of the newspaper references to the defendant bank although it was clear they were aware of the insolvency of American Allied on which the district court rested its decision.

In my opinion there was not a sufficient basis in the newspaper articles to cause even suspicions that the bank

was improperly involved with American Allied. In other words, an ordinarily prudent man would not have been put on inquiry as to the bank.

I would reach the same result as to the deposition testimony of Jensch and Lewis. Jensch testified that he may have been aware of the fact that the defendant had been mentioned in the newspaper articles but he assumed that the bank lent money to the Kitzers or were their financial backers or something like that. The deposition itself indicated that Jensch had attended a number of sessions of the insolvency trial and did make inquiries of a number of people but did not get very far asking questions. Apparently none of these questions were directed toward the bank because the name was not familiar to him. As far as Jensch's testimony is concerned, I find no indication of any fact which would have caused him to think that the hearing or newspaper references to the defendant bank were other than that American Allied had an account at the bank and that the bank was attempting to protect collateral it had on a loan.

It appears to me that the indicia of fraudulent concealment on the part of the defendant bank were so minimal as to fall within the orbit or the principle stated in 54 C.J.S. *Limitations of Actions* §189 at 193 (1948):

> "The courts will not lightly seize on some small circumstance to deny relief to a party plainly shown to have been actually defrauded against those who defrauded him, on the ground that he did not discover the fact that he had been cheated as soon as he might have done; it is only where the party defrauded should plainly have discovered the fraud except for his inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on the subject."

Here, of course, the plaintiff has been denied by the limitations bar the opportunity of showing that it had been defrauded.

A person is only charged with the knowledge which proper inquiry would disclose where he has *reasonable grounds* for suspecting or inquiring, but here, there being a wide difference between suspicion and knowledge, evidence that there existed a suspicion in a person's mind is not equivalent to evidence of notice. 58 AM.JUR.2d *Notice* §13 (1971).

Even if it were to be assumed that there was such a reference to the defendant bank in the newspaper article of September 17, in which knowledge of improprieties on the part of American Allied by the bank was first specifically stated, in my opinion, the statute did not start running from the raising of the first flag of suspicion. This brings into play a rule of law which appears to me to be a matter of first impression in the State of Illinois. However, this is merely an extension of the general rule which there is no reason for thinking Illinois would not follow. This rule, which might be termed "a reasonable period for inquiry" rule in the context of a statute of limitations situation, is stated in *United States* v. *Booth-Kelly Lumber Co.*, 246 F. 970, 972 (D.Ore. 1917), as follows:

> "Notice and knowledge of the fraud will set the statute in operation. No one questions the principle. But a party claiming fraud and lack of knowledge concerning it may be guilty of laches in ascertaining its existence, which will preclude him from asserting want of knowledge, where he has been let into facts and circumstances which are calculated to put a reasonably intelligent man upon inquiry as to the main fact, which inquiry, if reasonably pursued with rea-

sonable diligence, would lead to a discovery of such main fact. Stated generally, the rule is that whatever puts a party upon inquiry amounts, in judgment of law, to notice, provided the inquiry becomes a duty and would lead to a knowledge of the real facts by the exercise of ordinary intelligence. *The circumstances known to him must be such as ought reasonably to have excited his suspicion and led him to inquiry, and he must be allowed a reasonable time within which to make such inquiry before being affected with notice.*" (Emphasis added.)

The principle is recognized in 66 C.J.S. *Notice* §11b.(3) as follows:

> "A person put on inquiry by facts is to be allowed a reasonable time in which to make such inquiry before being affected with notice. Neither law nor equity will impute to a person a knowledge of facts which he has not had a reasonable opportunity to ascertain. What constitutes a sufficient lapse of time for notice depends on the circumstances of the case." (Footnotes omitted.)

The general rule has been stated in *Nettles* v. *Childs*, 100 F.2d 952, 957 (4th Cir. 1939), "if a person has actual knowledge of facts which would lead an ordinarily prudent man to make further investigation, the duty to make inquiry arises and the person is charged with knowledge of the facts which inquiry would have disclosed." The logical extension of the rule would appear to be that he should not be charged with knowledge prior to inquiry or prior to a reasonable period of time which would be necessary for inquiry. To hold otherwise would be to place the person without actual knowledge in a less advantageous position than the person with actual knowledge.

I recognize that the "reasonable period for inquiry" rule has not been, as far as I have been able to discover, the subject of particularized application but only of general enunciation. The cases examined, however, have not evolved from close timewise situations such as the present case and there had not been a necessity for application of the rule. I also recognize in respect to the rule it could be argued that, once the waving flag is up, the prospective litigant has five years in which to inquire and to institute his suit, an arguably reasonable time. However, the litigant who has actual notice has a full five year statutory period allowing actual knowledge. I can conceive no valid reason in logic or justice for the prospective litigant in the uncertain and sometimes ambivalent area of fictitious constructive notice having less time, which would be true if he were denied a reasonable time to inquire diligently so as to verify what is at best only a clue.

The general rules of law pertaining to the imputing of knowledge following information or knowledge of certain extraneous facts which of themselves do not amount to, nor tend to show, actual notice, but which are sufficient to put a reasonably prudent man upon inquiry are summarized in 58 AM.JUR.2d *Notice* §§8 and 9 (1971). The text points out, however, that there must also be such circumstances that the inquiry, if made and followed up with reasonable care and diligence, would lead to the discovery of the truth, a questionable inference on the record before us. Finally, the AM.JUR. text recognizes the necessity of reasonable time for inquiry: "A reasonable cause to know is not equivalent to knowledge. Neither law nor equity will impute to a person knowledge of facts which he has not had a reasonable opportunity to ascertain." 58 AM.JUR., *supra*, §9.

It is obvious from the record in this case that the machinations of the top officials of American Allied had produced a complicated and murky picture involving dealings with several banks. Certainly the picture had not been brought into focus by September 23, 1965, in Minneapolis where a grand jury had been in session along with various suits and proceedings over the summertime. The state Insurance Commissioner was involved, and answers continued to be elusive.

I cannot see from the examination of the record that diligent inquiry would have produced knowledge of the defendant bank's involvement even if inquiry had commenced a month or two before that date. Accordingly, I would hold that the statute of limitations did not commence until some time after September 23, 1965, and therefore that the suit was timely filed.

I have little patience with or sympathy for litigants who wait until the eve of the date when arguably the time of limitations might be considered as having expired, although it is not clear from the record when the first date became reasonably knowable that the defendant bank was involved. In any event, the statute of limitations allows five years in the case of fraudulent concealment and I do not conceive that the plaintiff here received its legal allowance.

The majority opinion determines as a matter of law that the action was filed beyond the statutory period of limitations. I would have determined as a matter of law that upon either of two bases the statutory period had not expired. Neither of the court's opinions relies on the basis of the district court's determination. Therefore, at the very least it would appear to me that there should be a reversal and a remand to determine factually, and not as a matter of law, whether there was a basis for a

reasonably prudent person to have been alerted that the defendant bank might be improperly involved with American Allied, and, if so, specifically when the duty to exercise diligent inquiry arose and what would be a reasonable time thereafter in which to make the inquiry. Inasmuch as the district court's decision rested on an incorrect ground, the record is questionably complete to supply the answers to the above essential questions.

I have herein addressed myself only to the limitations question and, of course, express no opinion as to whether there was an otherwise valid cause of action for fraudulent concealment stated in the plaintiff's complaint.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

JUDGMENT ORDER

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

February 20, 1973

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

APPENDIX C

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

March 15, 1973.

On consideration of the petition for rehearing filed in the above-entitled cause,

It Is Hereby Ordered that the petition for rehearing in the above-entitled appeal be and the same is hereby denied.

Judge Pell voted to grant the petition for rehearing.

APPENDIX D

CONSTITUTION OF THE UNITED STATES

Amendment [VII.]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12.

Defenses And Objections—When And How Presented—By Pleadings Or Motion—Motion For Judgment On The Pleadings

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 56.

Summary Judgment

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

ILL. REV. STAT., 1965, CH. 83, §16

16. *Oral contracts—Arbitration awards—Damages to property—Possessory actions—Civil actions.*] § 15. Except as provided in Section 2-725 of the "Uniform Commercial Code", approved July 31, 1961, as amended,[1] and Section 11-13[2] of "The Illinois Public Aid Code", approved April 11, 1967, as amended, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued.

Amended by P.A. 76-135, § 1, eff. June 13, 1969.

[1] Chapter 26, § 2-725.

[2] Chapter 23, § 11-13.

No. 72-1560

Supreme Court, U.S.
FILED
JAN 19 19
MICHAEL RODAK, JR.

In the Supreme Court of the United States

NATIONAL FAMILY INSURANCE COMPANY,
a Minnesota Corporation,

Petitioner,

vs.

EXCHANGE NATIONAL BANK OF CHICAGO,
a National Banking Association,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

No. 72-1560

NATIONAL FAMILY INSURANCE COMPANY,
a Minnesota Corporation,

Petitioner,

vs.

EXCHANGE NATIONAL BANK OF CHICAGO,
a National Banking Association,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, and the dissenting opinion (App. A of the Petition) are reported at 474 F.2d 237.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

ISSUES PRESENTED

1. Does any ground exist in the instant case for the granting of a writ of certiorari?

2. Did the district court improperly dismiss the complaint on the basis of the Illinois statute of limitations, on the ground that plaintiff knew or should have known of its cause of action against defendant more than five years prior to the filing of the complaint?

3. Do the procedural arguments, raised by plaintiff for the first time on appeal, have merit, since a full trial on the limitations issue was conducted below and since plaintiff raised no objection to the proceedings?

CONSTITUTIONAL PROVISION, STATUTES, AND RULES INVOLVED

The pertinent provisions of the Constitution of the United States, United States Code, and the Federal Rules of Civil Procedure are set forth as follows:

Constitution of the United States, Amendment 7
(set forth in Appendix to Petition)

Judiciary Act of 1865 §4
13 United States Statutes at Large 501
(Appendix B of this responsive brief)

United States Supreme Court Rule 19
(Appendix C of this responsive brief)

Federal Rules of Civil Procedure:

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(Appendix D of this responsive brief)

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(Appendix E of this responsive brief)

Rule 43(e)
(Appendix F of this responsive brief)

Rule 46
(Appendix G of this responsive brief)

Rule 56
(set forth in Appendix to Petition)

Illinois Revised Statutes, ch. 83, §16
(set forth in Appendix to Petition)

STATEMENT OF THE CASE.

Plaintiff, National Family Insurance Company of St. Paul, Minnesota, is seeking review of the affirmance, by the United States Court of Appeals for the Seventh Circuit, of an Order of the United States District Court for the Northern District of Illinois dismissing an action against Defendant, Exchange National Bank of Chicago. The dismissal was based upon the fact that the five-year Illinois Statute of Limitations had run prior to the date of the filing of the complaint, September 23, 1970. The complaint alleged that defendant had fraudulently misrepresented the financial status of a company which had reinsured 100% of plaintiff's insurance obligations.

The limitations issue was raised by defendant's motion to dismiss (later converted by defendant, in the alternative under Rule 12(b), Fed. Rules Civ. Proc., to a motion for summary judgment; App. 200), and was pursued by full briefing by the parties, including the submission of a number of exhibits, affidavits, and counter-affidavits, as well as the taking of depositions. Plaintiff, in its memorandum in opposition to the motion to dismiss, asked the

trial court to allow the presentation of evidence concerning its defense to the statute of limitations. (App. 202-203.) On May 3, 1970, the district court issued a memorandum opinion which decided the contested issues of law in defendant's favor, but concluded that certain factual issues remained which would preclude summary judgment. Due to the complexity of the case, however, the court ordered a separate factual hearing on the limitations issue. (App. 99-105.) The depositions were subsequently taken in Minnesota and filed with the district court.

Two hearings were held before Judge McGarr on June 9 and June 23, 1970, at which plaintiff presented several witnesses and, along with defendant, argued the case to the court. At no time was any objection ever made as to the propriety of the hearing, until plaintiff's brief was filed in the court of appeals, nor did plaintiff ever otherwise indicate in any way—either before, during or after the hearing—its desire to have any factual questions raised by the limitations issue decided by a jury.

At the conclusion of the June 23 hearing, Judge McGarr rendered his opinion from the bench, finding that plaintiff knew or should have known of its cause of action, if any, against defendant at latest during the summer of 1965, more than five years before the filing of the present action. Accordingly, the court concluded, the statute of limitations had run and the action was dismissed. (App. 155-156.)

On appeal, the Seventh Circuit, per Hastings, J., affirmed, holding that "the district court was amply justified in finding and holding that plaintiff knew or should have known of its cause of action against defendant more than five years prior to filing its complaint on September 23,

1970." The court of appeals further denied plaintiff's "belated contention" that it was denied its right to a jury trial, holding that the district court did not act summarily and that plaintiff had waived its right to a jury—an issue raised for the first time on appeal. Even the dissenting opinion fully agreed with the latter holding.

STATEMENT OF FACTS

Plaintiff's statement of facts is substantially incomplete and one-sided. A more thorough treatment of the facts is found in the opinion of the court of appeals (Appendix A of the Petition).

The synopsis of the newspaper articles (App. 15-20) is referred to by plaintiff (Petition, p. 6) as set forth in the Addendum to its Petition, but does not appear therein. Defendant has reproduced the synopsis as Appendix A to this responsive brief.

ARGUMENT

I.

THE PETITION FOR CERTIORARI SHOULD BE DENIED SINCE NO GROUND EXISTS FOR THE GRANTING OF THE WRIT.

The exercise of certiorari jurisdiction has been the frequent subject of scholarly debate and pronouncements of the Court and its Justices. In *Magnum Co.* v. *Coty*, 262 U.S. 159, 163 (1923), Chief Justice Taft, in much quoted language, stated:

> "The jurisdiction [of the Supreme Court to review cases by certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty percent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

The petition in the instant case falls within the category of cases referred to by Chief Justice Taft as outside the scope of Supreme Court review. Plaintiff seeks in this Court, as it did in the court of appeals, a general review of the factual determinations of the district court. The obvious weakness of the argument on the facts was attempted to be overcome by plaintiff's raising the issue of the right to a jury trial—an afterthought raised for the first time on appeal, and an issue not even contested in the dissenting opinion.

Plaintiff's main complaint of the factual inadequacy of the judgment of the district court is insufficient to invoke

this court's certiorari jurisdiction. As stated by Mr. Justice Holmes in *United States* v. *Johnston*, 268 U.S. 220, 227 (1925), this Court does "not grant a certiorari to review evidence and discuss specific facts." Especially is this so when, as in the instant case, such findings have been affirmed by a court of appeals. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

It was in the court of appeals that plaintiff complained for the first time that it had been denied the right to a jury trial by the district court's holding of an evidentiary hearing concerning the issue of the statute of limitations—a hearing which was requested by plaintiff itself (App. 202-203) and in which plaintiff appeared and participated without any mention of a jury demand. The consequent waiver, as found by the court of appeals, is manifest from the record.

Thus, plaintiff's arguments have no basis in law or in fact, and in addition fail to rise to the standards enunciated by this Court and by Supreme Court Rule 19 as appropriate for certiorari jurisdiction.

II.

PLAINTIFF'S ARGUMENTS ARE WITHOUT MERIT SINCE THE FACTUAL FINDINGS BY THE DISTRICT COURT AND THE FINDING OF WAIVER OF THE RIGHT TO A JURY BY THE COURT OF APPEALS ARE AMPLY SUPPORTED BY THE RECORD.

A. THE COMPLAINT WAS PROPERLY DISMISSED SINCE THE RECORD INDISPUTABLY ESTABLISHES THE FACT THAT PLAINTIFF KNEW OR SHOULD HAVE KNOWN OF ITS CAUSE OF ACTION AGAINST DEFENDANT MORE THAN FIVE YEARS PRIOR TO THE FILING OF THE COMPLAINT.

1. THE UNDISPUTED FACTS DEMONSTRATE THAT PLAINTIFF WAS PUT ON NOTICE OF ITS CAUSE OF ACTION MORE THAN FIVE YEARS PRIOR TO SEPTEMBER 23, 1970.

The record below fully supports the finding of the district court that the five-year Illinois statute of limitations had run prior to the institution of this action on September 23, 1970. The documentary evidence and depositions introduced by defendant, and summarized by the opinion of the court of appeals, demonstrate that the cause of action asserted by plaintiff accrued in the spring, or at latest, the summer of 1965, and that plaintiff was put on sufficient notice at that time to start the running of the limitations period. *Jackson* v. *Anderson*, 355 Ill. 550, 557, 189 N.E. 924 (1934); *Bush* v. *Continental Casualty Co.*, 116 Ill. App. 2d 94, 253 N.E. 2d 619 (1969); *Nogle* v. *Nogle*, 53 Ill. App. 2d 457, 465, 202 N.E. 2d 683 (1964).

2. PLAINTIFF COULD NOT AVOID THE LIMITATIONS BAR SINCE IT FAILED TO ALLEGE OR PROVE ANY AFFIRMATIVE ACT OF FRAUDULENT CONCEALMENT.

Plaintiff's attempt to avoid the limitations bar by merely alleging that defendant had fraudulently concealed the cause of action from plaintiff failed to specify any affirmative act of concealment on the part of defendant, as is required by Illinois law, and plaintiff, at trial, failed to produce any such evidence whatsoever. Thus, as a matter of law, plaintiff was barred from instituting this action against defendant. *Skrodyki* v. *Sherman State Bank,* 348 Ill. 403, 407, 181 N.E. 325, 327 (1932); *Fortune* v. *English,* 226 Ill. 262, 268-269, 80 N.E. 781 (1907); *Mathews* v. *Atlas Liquors, Inc.,* 132 Ill.App.2d 608, 270 N.E.2d 453, 455 (1971); *Nogle* v. *Nogle,* 53 Ill. App. 2d 457, 466, 202 N.E. 2d 683 (1964). For analogous federal decisions, *cf., Baker* v. *F. and F. Investment Co.,* 420 F.2d 1191, 1198-99 (7th Cir. 1970); *Burnham Chemical Co.* v. *Borax Consolidated,* 170 F.2d 569, 573-574, n.4 (9th Cir. 1948), *cert. denied,* 336 U.S. 924.[1]

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[1] Plaintiff itself recognizes this principle in its citation of the Illinois case of *Ohlendorf* v. *Bennett,* 241 Ill.App. 537, 565 (1926), which states the "reasonable diligence" rule. However, the two United States Supreme Court cases cited at page 19 of plaintiff's Petition were not decided under the Illinois statute and thus do not accurately state the criteria applied in Illinois to the statutory fraudulent concealment exception.

B. THE PROCEDURAL ARGUMENTS RAISED BY PLAINTIFF FOR THE FIRST TIME ON APPEAL ARE WITHOUT MERIT SINCE A FULL AND FAIR TRIAL WAS CONDUCTED BY THE COURT BELOW AND SINCE PLAINTIFF RAISED NO OBJECTION TO THE PROCEEDINGS.

1. THE DISTRICT COURT, WITHOUT OBJECTION, HELD A FULL TRIAL ON THE LIMITATIONS ISSUE AND DID NOT DECIDE IT SUMMARILY.

Plaintiff's contention that the limitations issue was decided summarily is entirely without merit and, in addition, was raised for the first time on appeal. First, plaintiff asked the district court to allow it to present evidence on the limitations issue. The court granted that request and, pursuant to Rules 42(b) and 43(e), Federal Rules of Civil Procedure, held a full trial on that issue without any objection by plaintiff. At that trial, plaintiff voluntarily presented evidence and brought witnesses from Minnesota to testify.[2]

In addition, at no time, until it filed its brief in the court of appeals, did plaintiff complain that it was not afforded full procedural safeguards.

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[2] Plaintiff, in its Petition (at p. 6) makes reference to the district court's apology "for the piecemeal fashion" in which the court was trying the limitations issue. (App. 147-C.) This remark was made at the beginning of the second hearing, and *did not relate* to the fact that the limitations issue was being tried separately, but related only to the necessity of having to postpone the second hearing for several weeks due to other more urgent intervening judicial business. Defendant pointed this out in its brief filed in the court of appeals but plaintiff has nevertheless made the same incorrect inference here.

Thus, the procedure followed by the district court was entirely appropriate under both the Rules and the case law,[3] and plaintiff, by its actions and full participation in the trial, without objection, is precluded from raising these procedural issues as an afterthought for the first time on appeal. Rule 46, Federal Rules of Civil Procedure; *Brown* v. *Wisconsin State Department of Public Welfare,* 457 F.2d 257 (7th Cir. 1972); *Desert Palace, Inc.* v. *Salisbury,* 401 F.2d 320, 324 (7th Cir. 1968); *Occidental Petroleum Corp.* v. *Walker,* 289 F.2d 1, 6 (10th Cir. 1961).

2. PLAINTIFF WAIVED ANY RIGHT IT MAY HAVE HAD TO A JURY TRIAL ON THE LIMITATIONS ISSUE SINCE IT PROCEEDED WITHOUT OBJECTION TO PARTICIPATE IN THE TRIAL OF THAT ISSUE BEFORE THE COURT.

Plaintiff's contention that it was entitled to a jury trial on the limitations issue likewise ignores the basic fact that it proceeded to the trial of that issue before the court without objection. During the more than seven weeks which transpired between the issuance of the memorandum opinion ordering the factual hearing and the conclusion of the proceedings below, no mention was made of plaintiff's now-asserted desire to have a jury decide the issue. Instead, plaintiff proceeded to present its case and take full advantage of its rights in the court below. Moreover, no post-trial motions of any kind were filed by plaintiff,

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[3] See *Burnham Chemical Co.* v. *Borax Consolidated, supra,* 170 F.2d 569, 572-573, 575 (9th Cir. 1948), *cert. denied,* 336 U.S. 924; *Momand* v. *Paramount Pictures Dist. Co.,* 36 F.Supp. 568, 571 (D. Mass. 1941); *Seaboard Terminals Corp.* v. *Standard Oil Co.,* 30 F.Supp. 671, 672 (S.D.N.Y. 1939); 5 Moore's Fed. Prac. ¶42.03.

either on the jury issue or otherwise. In fact, the first time the jury question (or any other procedural issue) was raised was in the plaintiff's brief in the court of appeals.

The law is clear that such inaction by a party to a lawsuit amounts to a waiver of the right to a jury trial. In *Kearney* v. *Case*, 79 U.S. 275 (1870), the applicable statute then in effect[4] provided that a jury would be empaneled unless a written waiver was filed with the court. (See 79 U.S. at 280.) Although no such waiver had been filed in *Kearney*, the parties proceeded to trial without objecting to the case being heard by the court without a jury. After an adverse judgment was rendered, the defendant appealed on the ground that a jury should have been empaneled under the statute. This Court rejected that argument, and observed that it was settled that the Seventh Amendment right to a jury trial "might be waived by the parties, and that the judgment of the court in such cases should be valid." 79 U.S. at 281. Despite the statutory requirement of a written waiver, the Court went on to hold (79 U.S. at 284):

> "When we consider the cases already cited, in which such a waiver has been implied, and that the right to have a jury when a party demands it, is so universally known and respected, we think that it is almost a necessary inference, where a party is present by counsel and goes to trial before the court without objection or exception, he has voluntarily waived his right to a jury, and must be held in this court to the legal

[4] Judiciary Act of 1865, §4, 13 Statutes at Large 501 (Appendix B of this responsive brief).

consequences of such a waiver. *Phillips* v. *Preston*, 5 How. 290."[5]

Any other rule would mean that a party could, by silence, permit a judge to try the case and then insist upon a re-trial if the judgment went against him.

In the instant case, plaintiff appeared at the trial below with both local counsel and Minnesota house counsel present, presented witnesses and documentary evidence, and argued its case to the court without any mention of a desire to have a jury empaneled at the trial of the limitations issue. There could hardly be a more explicit case of waiver by one's actions than is presented by this case.

The procedural points raised by plaintiff's Petition—points touched upon only tangentially by plaintiff's counsel at argument before the court of appeals, and on which both the majority and dissenting opinions agreed—amount to nothing more than an afterthought on its part, which may not be asserted for the first time on appeal. See *Desert Palace, Inc.* v. *Salisbury, supra,* 401 F.2d at 324 (7th Cir. 1968); *Brown* v. *Wisconsin State Dept. of Public Welfare, supra,* 457 F.2d 257 (7th Cir. 1972).

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[5] See also, *Smith* v. *Cushman Motors Works,* 178 F.2d 153, 154 (8th Cir. 1950) (consent by parties to try determinative preliminary issue before court constitutes waiver of jury demand); *Maytag Co.* v. *Meadows Mfg. Co.,* 45 F.2d 299, 301-302 (7th Cir. 1931) (submission without objection of issue of damages to a master amounts to a waiver of the right to a jury trial); *Bradley* v. *Maryland Casualty Co.,* 382 F.2d 415, 420 (8th Cir. 1967); *West* v. *Devitt,* 311 F.2d 787, 788 (8th Cir. 1963) (denial of mandamus to compel a jury trial of the issue of laches where, although a jury demand had been filed, the parties had agreed to try the issue before the court).

CONCLUSION

Plaintiff fails to assert any proper ground for the granting of certiorari in the instant case. The Petition represents merely the final attempt to re-litigate the statute of limitations issue it lost in the district court.

The record below clearly establishes that the five-year Illinois statute of limitations barred the institution of the present action, and that plaintiff's attempt to avoid this bar was fatally deficient both in its allegations and its presentation of evidence at the trial. The finding by the district court that the limitations period had run was amply supported by uncontradicted evidence and should be affirmed on the merits.

Further, the procedural issues raised by plaintiff for the first time on appeal are without merit. After asking the trial court to allow it the opportunity to prove its general allegations of fraudulent concealment, plaintiff went to trial on that issue without objection. Until plaintiff filed its brief in the Seventh Circuit, no request was ever made—either before, during, or after the proceedings below—that a jury be empaneled to try the limitations issue. Thus, plaintiff waived any right it may have had to a jury, and was accorded full procedural due process in the district court.

Surely a litigant cannot await the outcome of a bench trial and then, if it loses, assert its own participation as error, for the first time on appeal.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL FAMILY INSURANCE COMPANY, a Minnesota Corporation, Plaintiff,	)	
vs.	)	NO. 70 C 2346
EXCHANGE NATIONAL BANK OF CHICAGO, a National Banking Association, Defendant.	)	

AFFIDAVIT IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

Robert W. Gettleman, being first duly sworn, on oath deposes and says:

1. I am one of the attorneys for the above-named defendant. I have personal knowledge of the matters herein referred to, and make this affidavit in support of defendant's motion to dismiss.

2. The following is a list of newspaper articles, with their Exhibit numbers as attached hereto, the dates in which they appeared in their respective publications, and a brief description of the relevant contents thereof, which newspaper

EXHIBIT 1.

40

articles were copied by me from the newspaper files of the St. Paul, Minnesota Public Library and the Minneapolis, Minnesota Public Library, as well as from the files of the United States District Court for the District of Minnesota (Case No. 3-66-7Cr, United States v. Kitzer, et al.), which research took place on the 26th day of October, 1970:

Exhibit Number	Date	Source	Description
2.	April 12,1965[1].	Trib[2].	Two Republican legislators charge Insurance Commissioner Magnusson with failure to act. Mentions disbursements of $1 million from American Allied to an "unauthorized Chicago Bank account."
3.	May 29	Trib	Mentions transfer of $1 million to a Chicago bank account unauthorized by American Allied directors.
4.	June 13	Trib	Mentions $1 million in Chicago bank account.
5.	June 19	Star[3]	Magnusson testifies that the Kitzers "saved" National Family by "100% reinsuring its claims back to January 1, 1963."
6.	June 23	Star	Testimony that secret transfer of $1.1 million to Chicago bank and subsequent withdrawal, was satisfactorily explained.

1. All dates hereafter refer to 1965.
2. "Trib" signifies the Minneapolis Tribune.
3. "Star" signifies the Minneapolis Star.

Exhibit Number	Date	Source	Description
7.	June 24	Dispatch[4]	Mentions deposit of $1.1 million in a Chicago bank, not shown on American Allied's books; insurance examiner S.C.Haugen testified that "the $1.1 million dollar bank account was in the Exchange National Bank of Chicago."
8.	June 24	Trib	Same story as above, but mentions only "a Chicago bank," not by name.
9.	June 28	Star	Testimony that the $1.4 million of American Allied funds "transferred to a Chicago bank account" did not affect company's solvency.
10.	June 29	Star	Testimony that Lord was especially interested in a $1.1 million account in a Chicago bank, representing funds from American Allied to Kitzer.
11.	July 12	Star	Story of Chicago suit by Illinois Attorney General against Kitzers, charging that Kitzer Sr. took $295,000 from Bell Casualty and $295,000 from Bell Mutual "and pledged the securities to the Exchange National Bank of Chicago to cover personal loans."
12.	July 20	Star	Reports Illinois insurance department claim that Kitzer Sr. "pledged securities belonging to [the Bell companies] as collateral for personal loans at a bank."
13.	July 24	Trib	Mentions funds "shifted between Twin Cities and Chicago,Ill. banks."

4. "Dispatch" signifies the St. Paul Dispatch.

Exhibit Number	Date	Source	Description
14.	August 5	Star	Story on appointment of receiver: order recited that American Allied's home office at 275 E. 4th St., St. Paul, was valued at $600,000 but worth only $440,000.
15.	August 5	Trib	Same story as above.
16.	August 8	Trib	Mentions the shift of $1.1 million from St. Paul to Chicago, plus the $200,000 to a Chicago bank (apparently Bank of Clearing).
17.	August 13	Trib	Federal Grand Jury subpoenas local bank records plus "two officials of a Chicago, Ill., bank and a New York, N.Y., investment firm."
18.	August 21	Star	Story of a Chicago woman's suit to foreclose on mortgage of American Allied's home office in St. Paul; "the mortgage originally was recorded in the name of Exchange National Bank of Chicago." Bonhiver indicates he will contest validity of the mortgage as well as the foreclosure.
19.	September 10	Trib	Story of Illinois court's liquidation order of the two Bell companies; mentions the $600,000 of assets pledged to a bank on a loan
20.	September 14	Star	Story of Kitzer's challenging a Grand Jury subpoena -- Lord wants to find out what happened to the proceeds ($247,500) of mortgage of home office property; "In an effort to determine what became of additional assets of American Allied the Federal Grand Jury subpoened five Chicagoans. They are: Maurice Nettel, a vice-president and three tellers of the Exchange National Bank of Chicago."

Exhibit Number	Date	Source	Description
21.	September 17	Star	Story of Bonhiver's suits to guard assets -- describes in detail the suit to set aside mortgage on home office and names Exchange National Bank of Chicago as a defendant: "It is alleged that the bank paid over the money to Kitzers knowing that they were borrowing it for 'their own personal use.' It also is claimed that the Chicago Bank assigned the mortgage to Mrs. Brown while proceedings were pending before [Judge] Pearson to have the company declared insolvent."
22.	September 18	Trib	Same story and detail as above.
23.	September 18	Pioneer[5]	Same story and detail as above.
24.	September 21	Dispatch	Caption: "Jury due to hear Chicago Banker" -- Story of John Carroll's pending appearance before grand jury; states that he "could not be located for service of the subpoena in August. Mentions Exchange National Bank by name.

3. Attached hereto as Exhibit 25 is a true and correct copy of the counterclaim filed by National Family Insurance Co. in the United States District Court for the District of Minnesota, Case No. 3- 68 Cr. 24, attached to its Motion to Intervene in that case.

5. "Pioneer Press" signifies the St. Paul Pioneer Press.

4. Attached hereto as Exhibit 26 are copies of pages from Best's Insurance Reports for the years 1964 and 1965.

Further affiant sayeth not.

Robert W. Gettleman
Robert W. Gettleman

Subscribed and sworn
to before me this 9th
day of December, 1970.

Dorothy E Lewis
Notary Public

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APPENDIX B

Judiciary Act of 1865, §4, 13 Statutes at Large 501

And be it further enacted. That issues of fact in civil cases in any circuit court of the United States may be tried and determined by the court without the intervention of a jury, whenever the parties, or their attorneys of record, file a stipulation in writing with the clerk of the court waiving a jury. The finding of the court upon the facts, which finding may be either general or special, shall have the same effect as the verdict of a jury. The rulings of the court in the *court* [cause] in the progress of the trial, when excepted to at the time, may be reviewed by the supreme court of the United States upon a writ of error, or upon appeal, provided the rulings be duly presented by a bill of exceptions. When the finding is special, the review may also extend to the determination of the sufficiency of the facts found to support the judgment.

APPENDIX C

United States Supreme Court Rule 19

Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

APPENDIX D

Rule 12(b), Federal Rules of Civil Procedure

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

APPENDIX E

Rule 42(b), Federal Rules of Civil Procedure

Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claims, counterclaim, or third-party claim, or of any separate issue, or of any claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

APPENDIX F

Rule 43(e), Federal Rules of Civil Procedure

Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

APPENDIX G

Rule 46, Federal Rules of Civil Procedure

EXCEPTIONS UNNECESSARY

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.